88-223

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KATHRYN REILLY and JOSEPH REILLY,

Petitioners,

v.

BLUE CROSS AND BLUE SHIELD UNITED OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

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B. Whether A State Law Claim Of Bad Faith Is "Saved" From The Pre-emptive Effect Of ERISA?

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OPINIONS BELOW

The judgment in *Reilly v. Blue Cross*,[1] Case No. 87-2281 (7th Cir. 1988) was decided and entered on May 5, 1988.

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[1] *Kathryn Reilly and Joseph Reilly v. Blue Cross and Blue Shield United of Wisconsin*, United States Court of Appeals for the Seventh Circuit, Case No. 87-2281, by the Honorable Hubert L. Will.

JURISDICTIONAL STATEMENT

The United States Supreme Court has jurisdiction to review the judgment in question herein by writ of certiorari pursuant to 28 U.S.C. sec. 2101(c).

STATUTES INVOLVED

This case involves the following statutory provisions: sec. 514(a), 29 U.S.C. sec. 1144(a); sec. 514(b)(2)(A), 29 U.S.C. sec. 1144(b)(2)(A); sec. 502(a)(3), 29 U.S.C. sec. 1144(a)(3); and 29 U.S.C. sec. 1132(a)(3).

Sec. 514(a), 29 U.S.C. sec. 1144(a) states in pertinent part:

> "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all state laws in so far as they may now or hereafter relate to any employee benefit plan . . . ."

Sec. 514(b)(2)(A), 29 U.S.C. sec. 1144(b)(2)(A) states:

> "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities."

Lastly, sec. 502(a)(3), 29 U.S.C. sec. 1144(a)(3) provides:

> "A civil action may be brought:
>
> (3) By a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate relief (i) to redress such violations or (ii) to enforce any provisions of the subchapter or terms of the plan;"

STATEMENT OF THE CASE

Plaintiffs-Petitioners, Kathryn and Joseph Reilly, Wisconsin residents, brought this action against Blue Cross and Blue Shield United of Wisconsin (hereinafter "Blue Cross"), defendant-respondent, alleging that Blue Cross arbitrarily and capriciously denied the insurance claim for Mrs. Reilly's in vitro fertilization (hereinafter "IVF"). The plaintiffs' original complaint claims that Blue Cross breached the insurance contract, acted in bad faith, intentionally inflicted emotional distress, and caused a loss of consortium. The plaintiffs sought compensatory and punitive damages. This case was originally brought in Waukesha County Circuit Court.

Defendant, Blue Cross, subsequently removed this case to the United States District Court for the Eastern District of Wisconsin on the grounds that it raises a federal question under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) as amended, 29 U.S.C. sec. 1001, *et seq.* On June 1, 1987, Blue Cross moved for summary judgment against the plaintiffs' claim under ERISA arguing that its decision to deny coverage was not arbitrary, capricious, or motivated by bad faith and that the plaintiffs' state law claims were pre-empted by ERISA. On June 30, 1987, plaintiffs moved for leave to amend their complaint. Plaintiffs sought to add allegations of conspiracy, fraud, and breach of fiduciary duty based on newly discovered evidence.

On July 20, 1987 the district court by the Honorable Judge Thomas J. Curran, granted Blue Cross' motion for summary judgment and denied plaintiffs' motion to amend their complaint. *Reilly v. Blue Cross and Blue Shield*

United of Wisconsin, Case No. 86-C-622 (E.D. Wis. 1987). The district court concluded that the defendant's decision was not arbitrary, capricious, or motivated by bad faith and ERISA pre-empted the state law claims. In addition, the court held that if state law claims were not pre-empted, the district court would not take pendent jurisdiction over them.

On September 21, 1987, the plaintiffs sought review of the district court's decision in the United States Court of Appeals for the Seventh Circuit. The United States Court of Appeals for the Seventh Circuit had jurisdiction of that appeal pursuant to 28 U.S.C. sec. 1291.

On May 5, 1988, the United States Court of Appeals for the Seventh Circuit held in an opinion delivered by the Honorable Hubert L. Will that there was an issue regarding Blue Cross' decision to deny the plaintiffs' coverage for IVF and, thereby, reversed the district court's order granting Blue Cross' motion for summary judgment with respect to the plaintiffs' ERISA claim. (App. 17) The Court of Appeals also found that the plaintiffs' state law claim of bad faith and demand for punitive damages were pre-empted by ERISA and, thereby, affirmed the district court's dismissal of those claims. (App. 20) In their conclusory paragraph the court stated:

> "We find that the plaintiffs' state law claim of bad faith and demand for punitive damages are also pre-empted under ERISA and we affirm the district court's dismissal of these claims on this ground alone." (App. 21)

The Court of Appeals concluded that the proposed amended complaint regarding causes of action for breach of fiduciary duty, conspiracy, fraud, or bad faith are pre-empted by ERISA. The court found that the plaintiffs' proposed amended complaint alleged no new federal claim but mere-

ly asserted additional evidence relevant to the pending ERISA claim. (App. 21)

The plaintiffs, Kathryn and Joseph Reilly, petition this court for writ of certiorari regarding only the questions of their state law claims for bad faith and the demand for punitive damages. (See App. 21) Judgment in the United States Court of Appeals of the Seventh Circuit was entered on May 15, 1988. This petition for writ of certiorari is brought within the 90 day time period of entry of said judgment, pursuant to 28 U.S.C. sec. 2101(c).

REASONS FOR GRANTING THE WRIT

A.

PUNITIVE DAMAGES ARE AVAILABLE UNDER THE RATIONALE AND PURPOSES OF ERISA.

The United States Supreme Court held in both the *Massachusetts Mutual Life Insurance Company v. Russell*, 105 S. Ct. 3085 (1985) and *Pilot Life Insurance Company v. Dedeaux*, 107 S. Ct. 1549 (1987) cases that an individual beneficiary cannot recover extra contractual damages under ERISA sec. 409(a), see 29 U.S.C. sec. 1109. However, the Supreme Court in *Russell* and *Pilot Life* expressly left open the issue of whether or not punitive damages may be recovered under ERISA sec. 502(a)(3), 29 U.S.C. sec. 1132(a)(3).

29 U.S.C. sec. 1132(a)(3) states in part that:

> "A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this sub-

> chapter or the terms of the plan or (B) to obtain other appropriate relief (i) to redress such violations or (ii) to enforce any provision of the subchapter or terms of the plan;"

Essentially, the Seventh Circuit Court of Appeals in the present case decided that punitive damages may not be recovered in any section under ERISA. (App. 19) The availability of punitive damages is an important question that can only be resolved by the United States Supreme Court due to its expressed action by leaving said issue unresolved on a policy basis. It was in *Sommers Drug Stores v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1463 (5th Cir. 1986), where the court realized that the United States Supreme Court expressly left open the issue of whether punitive damages may be recovered under ERISA sec. 502(a)(3), 29 U.S.C. sec. 1132(a)(3). To this effect, the court in *Sommers* cites Note 5 of the *Russell* decision which states:

> "because respondent relies entirely on sec. 409(a), and expressly disclaims reliance on sec. 502(a)(3), we have no occasion to consider whether any other provision of ERISA authorizes recovery of extra contractual damages." 105 S. Ct. at 3089.

The issue of the recoverability of punitive damages under ERISA necessitates a determination to be made by the Supreme Court.

ERISA was intended to protect the rights of workers to health insurance benefits. It was not meant to protect insurers at the expense of workers' remedies. To disallow appropriate state law remedies or to preclude punitive damages under ERISA itself for *outrageous* conduct creates an incongruity. Given a restricted ERISA interpretation, workers who are denied health insurance benefits would be in a better position under state laws. ERISA

should not be utilized by insurers to limit their liability at the expense of workers' benefits.

The level of proof required for the plaintiff to prevail under ERISA is an arbitrary and capricious standard. *Wardle v. Central States Pension Fund*, 627 F.2d 820, 825 (7th Cir. 1980). This is essentially the same standard required *in a state court action* to allow consideration of punitive damages. It is incongruous that ERISA should require the same burden only to obtain payment of medical bills. Unions and management are not equipped to arbitrate technical issues of medical coverage. Most lawyers will not accept worker's cases in which recovery of the medical bills is the only issue. A worker commencing a state court contract action can expect removal to federal court. Attorney fees are at the *discretion* of the court. The insurer wins by default. The purpose of ERISA is totally nullified. It is unconscionable that a worker is saddled with an extraordinary burden of proof only to receive contract benefits. Legislators did not mean to create a law that curtails the availability of health benefits.

There are a number of cases commenced and presently pending in Wisconsin that involve denial of benefits in life threatening situations. Not one denial has been made by other than an insurer. The ERISA defense of pre-emption of state law remedies and the doubt about the availability of punitive damages under ERISA profoundly effects the very life of many patients. There is no speedy remedy that would save or prolong the life of these patients.

The deterrence of exemplary damages would save life itself by causing insurers and administrators to carefully review their basis for denying benefits. Automated denials and delays by uninformed clerks would be substituted with a reasonable evaluation of the claim.

The federal courts have added to the confusion regarding the necessity of punitive damages under ERISA. The Seventh Circuit herein denied the availability of punitive damages. Whereas, the Ninth Circuit, has consistently held that Congress intended to permit punitive damages in appropriate cases and that punitive damage awards are appropriate where a fiduciary has breached its duties. *Kuntz v. Reese*, 760 F.2d 926, 938 (9th Cir. 1985). The necessity for determining whether or not punitive damages are available also persists in the Eighth Circuit where originally in *Dependahl v. Falstaff Brewing Co.*, 653 F.2d 1208, 1216 (8th Cir. 1981) punitive damages were precluded by the court only to revese itself three years later in *Monson v. Century Manufacturing Co.*, 739 F.2d 1293, 1305 (8th Cir. 1984). The Eighth Circuit in *Monson* held that under ERISA certain fiduciary activities warranted the imposition of substantial punitive damages.

The lack of continuity between the federal courts regarding this issue imminently warrants a decision by the United States Supreme Court. Insurance companies have recently, and now consistently utilized ERISA as a shield against liability to avoid state law and common law remedies, otherwise available to deter outrageous conduct. Arbitrary denial of life saving health benefits in many cases necessitates a decision regarding the availability of a full range of remedies, including punitive damages. The petitioners respectfully request the court to grant the writ of certiorari to review the issue of availability of punitive damages under ERISA in order to deter outrageous conduct.

B.

THE PLAINTIFFS' STATE LAW CLAIM OF BAD FAITH IS "SAVED" FROM THE PRE-EMPTIVE EFFECT OF ERISA.

In the present case, the Court of Appeals relied on *Metropolitan Life Insurance Company v. Massachusetts*, 105 S. Ct. 2380, 2385 (1985) for the distinction between a plan that is self-insured or insured. That is, if a plan is self-insured it would not be "saved" from pre-emption. Whereas, insured plans would be "saved" from pre-emption by the savings clause provided in ERISA. The federal courts have not relied consistently upon that distinction.

ERISA contains a general pre-emption provision regarding the pre-emption of certain state laws. The pre-emption clause can be found in 29 U.S.C. sec. 1144(a)(2) which states in pertinent part:

> "except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all state laws in so far as they may now or hereafter relate to any employee benefit plan . . ."

The pre-emption clause of ERISA 29 U.S.C. sec. 1144 (a)(2) is, however, modified by 29 U.S.C. sec. 1144(b)(2)(A) which is referred to as the "savings clause". With respect to the savings clause, the intent of the Congressional lawmakers was clear in that they wished to preserve for the states the traditional role of insurance regulator as established by the McCarren-Ferguson Act. *Metropolitan Life Insurance Company v. Massachusetts*, 105 S. Ct. at 2389.

To maintain the states' role as insurance regulators, Congress enacted the "Savings" clause, 29 U.S.C. sec. 1144(b)(2)(A), which is the exception to the pre-emptive clause. 29 U.S.C. sec. 1144(b)(2)(A) provides:

> "except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities."

The court in *Metropolitan* began with the premise that Congress did not intend to pre-empt the areas of traditional state regulation. 105 S. Ct. at 2389. In fact, the State of Wisconsin has consistently regulated "plan administrators" like Blue Cross. See *Lueck v. Aetna Life Insurance Company*, 116 Wis. 2d 559, 342 N.W.2d 699 (1984). Administrators such as Blue Cross are subject to bad faith laws in Wisconsin. Moreover, administrators of health insurance plans also have a number of duties to individual insureds as well as to the federal government. *Lueck*, 116 Wis. 2d at 576. The states' supervision of insurance claims and practices, insured or self-insured, is critical to its citizens.

Failure to subject plan administrators to state laws would, in effect, provide carte blanche approval for bad faith conduct exhibited on behalf of entities holding responsibility of administrating employee benefit plans subject to ERISA. Carving out such an exception for self-insured plans would, in effect, be contrary to Congressional intent of ERISA and runs in direct contravention to the federal court rulings in other similar bad faith cases. (See *Simmons v. Prudential Insurance Company of America*, 641 F. Supp. 675 (D. Colo. 1986) and *Presti v. Connecticut General Life Insurance Company, Inc.*, 605 F. Supp. 163 (N.D. Cal. 1985). Unions and management uniformly allow insurers to administer the claims procedure. These administrators should not have their bad faith conduct shielded by the label "self-insured."

Therefore, the Petitioners respectfully request that the Court grant Writ of Certiorari and review the issue of

whether the petitioners' state law claim of bad faith is pre-empted by ERISA.

CONCLUSION

Wherefore, for the foregoing reasons including life threatening denial of benefits, the Petitioners' respectfully request the United States Supreme Court to grant their petition for Writ of Certiorari on the aforementioned questions presented for review.

Dated this 3rd day of August, 1988.

Respectfully submitted,

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-2281

KATHRYN REILLY and JOSEPH REILLY,

Plaintiffs-Appellants,

v.

BLUE CROSS AND BLUE SHIELD UNITED OF WISCONSIN, a corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 86 C 622—**Thomas J. Curran**, *Judge.*

ARGUED JANUARY 19, 1988—DECIDED MAY 5, 1988

Before BAUER, *Chief Judge*, POSNER, *Circuit Judge*, and WILL, *Senior District Judge.**

WILL, *Senior District Judge.* Kathryn and Joseph Reilly, plaintiffs-appellants, Wisconsin residents, brought this action against Blue Cross and Blue Shield United of Wisconsin ("Blue Cross"), defendant-appellee, a Wisconsin non-profit corporation, alleging that Blue Cross arbitrarily

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, Eastern Division, is sitting by designation.

and capriciously denied their insurance claim for Mrs. Reilly's in vitro fertilization ("IVF"). The plaintiffs' original complaint claims that Blue Cross breached the insurance contract, acted in bad faith, intentionally inflicted emotional distress and caused a loss of consortium. The plaintiffs seek compensatory and punitive damages.

Mr. Reilly is a Milwaukee public school teacher. He and his wife were covered under a self-insured group health plan which is part of the collective bargaining agreement between the Milwaukee Teachers Education Association ("MTEA") and the Milwaukee Public Schools ("MPS"). The plan was administered by Blue Cross for a fee "based, subject to certain limitations, on the dollar volume of covered charges approved for payment," Defendant-Appellee's Brief at 5. Blue Cross is not at risk for any health care costs.

Pursuant to Blue Cross' motion, the case was removed from the Waukesha County Circuit Court to the Eastern District of Wisconsin because it raises questions governed by the federal Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sec. 1001, *et seq.* Federal subject matter jurisdiction is based on 29 U.S.C. Sec. 1132(e).

Judge Curran ordered that nonexpert discovery be completed by January 1, 1987 and expert discovery by May 1, 1987. All dispositive motions were to be filed by June 1, 1987 and the trial was set for August 17, 1987. On June 1, 1987, Blue Cross moved for summary judgment against the plaintiffs' (1) ERISA claim, arguing that its decision to deny coverage was not arbitrary, capricious or motivated by bad faith, and (2) state law claims, arguing that these claims are preempted by ERISA. On June 30, 1987, the plaintiffs moved for leave to amend their complaint. They sought to add allegations of a conspiracy, fraud and breach of fiduciary duty based on newly discovered evidence allegedly concealed from them by Blue Cross.

Judge Curran granted Blue Cross' motion for summary judgment and denied the plaintiffs' motion to amend their complaint. He concluded that (1) the defendant's decision was not arbitrary, capricious or motivated by bad faith; (2) ERISA preempted the plaintiffs' state law claims; and (3) even if state law claims were not preempted, he would not take pendent jurisdiction over them. The plaintiffs appeal both the decisions on the parties' motions and the preemption conclusion as to the claims for punitive damages and of bad faith.

We find that material issues of fact exist as to whether Blue Cross' decision was arbitrary, capricious or motivated by bad faith and we therefore reverse the district court's order granting Blue Cross' motion for summary judgment with respect to the plaintiffs' ERISA claim. Because the plaintiffs did not appeal the district court's order that their claims of intentional infliction of emotional distress and loss of consortium are preempted under ERISA, we do not review this decision and the district court's order dismissing these claims is affirmed solely on the ground that they are preempted. We find that the plaintiffs' demand for punitive damages and claim of bad faith are preempted under ERISA because the health plan at issue is self-insured and state laws arguably "regulating insurance" are preempted by ERISA as to self-insured plans. We therefore affirm the district court's order dismissing those claims. Finally, we find that amending the plaintiffs' complaint with claims of conspiracy, fraud, bad faith and breach of fiduciary duty would be futile because such claims are not separate federal causes of action but simply further evidence relevant to whether Blue Cross' action was arbitrary, capricious or motivated by bad faith in violation of ERISA. In addition, if considered as state claims, they are also preempted. We therefore affirm the district court's order denying the plaintiffs leave to file an amended complaint.

FACTS

By 1978, Kathryn Reilly had received treatment for infertility. In 1982, she was diagnosed as having an independently treatable condition called endometriosis, which affects a woman's ability to conceive. Blue Cross paid for her initial treatments. Thereafter she was treated with artificial insemination, among other things, which was unsuccessful. On October 15, 1984, Mrs. Reilly underwent a successful IVF procedure at Waukesha Memorial Hospital in Wisconsin. On May 22, 1985, she gave birth to a baby girl, Nora.

The plaintiffs' insurance policy is outlined in two documents. One is a booklet distributed to plan members in January, 1981. It describes the benefits and exclusions. The other document is a group master contract which memorialized the agreement between the MPS and Blue Cross. This contract was renewed annually and, during the year following each renewal, a copy was forwarded to the MTEA. Individual group members did not receive a copy of this contract.

Blue Cross denied coverage for the expenses incurred by Kathryn Reilly's IVF procedure on the grounds that: (1) IVF was an experimental procedure, which was excludable under the master contract's general provision excluding experimental procedures; and (2) the contract specifically excluded coverage for an IVF procedure. Blue Cross claimed that the IVF was experimental under the general exclusion because it had a success rate of less than 50%. Blue Cross accepted the Reilly's claim for expenses incurred in the delivery of Nora, including intensive care.

The contract at issue was effective from July 1, 1984 to June 30, 1985. At the time of Mrs. Reilly's IVF, October 15, 1984, MTEA had not received the renewed contract for that period. According to the plaintiffs, as of October 1984, the MTEA was unaware of any exclusion under the master contract for IVF, either under the general provision excluding experimental procedures or as a specific exclusion.

Also, according to the plaintiffs, the MTEA first received notice that IVF procedures were excluded on September 19, 1985, long after the baby's birth in May and nearly one year after Mrs. Reilly's IVF. Notice was sent by Rhonda Koprowski, a Blue Cross supervisor, in a letter stating that "the wording in this contract was updated in October of 1984 [the effective date is July 1, 1984]. : ue to the timing of the services and the updating of the contract, the group may want to consider paying these charges as an exception." Marjan R. Kmiec Affidavit, June 16, 1987, Exhibit D. Blue Cross did not make an exception.

The district court assumed, for the purpose of its decision, that at the time of Kathryn Reilly's IVF, the parties were bound by the previous (1983-84) agreement which did not specifically list IVF either as being experimental or an excludable procedure. Accordingly, the district court assumed that the general provision in the 1983-84 contract excluding expenses for experimental and investigative procedures was the only provision under which Blue Cross could defend its decision. Our review is necessarily based on these same assumptions.

The 1983-84 contract's general provision excluding expenses for experimental and investigative procedures reads as follows:

> Services and procedures which are experimental/investigative in nature. Experimental/investigative means the use of any treatment, procedure, facility, equipment, drugs, devices or supplies not yet recognized as accepted medical practice by Blue Cross & Blue Shield United and any of such items requiring federal or other governmental agency approval and for which approval has not been granted at the time services were rendered.

Blue Cross claims that at the time of Kathryn Reilly's IVF, October, 1984, IVF was deemed experimental. The plaintiffs allege that IVF was not deemed experimental by the general expert medical community at the time of Kathryn Reilly's IVF and Blue Cross' formula employed

to determine whether IVF is experimental leads to an arbitrary and capricious conclusion.

STANDARD OF REVIEW

We must decide (1) if viewing the evidence in a light most favorable to the plaintiffs, there is a material issue of fact as to whether Blue Cross' decision was arbitrary, capricious or motivated by bad faith and violated ERISA; *Rodeo v. Gillman*, 787 F.2d 1175, 1177 (7th Cir. 1986); Fed.R.Civ.P. 56(c); (2) if the district court abused its discretion under Fed.R.Civ.P. 15(a) by denying the plaintiffs' motion for leave to amend their complaint; and (3) whether the plaintiffs' state law claims for bad faith and punitive damages are preempted under ERISA.

LIABILITY UNDER ERISA

The plaintiffs' health plan is governed by ERISA. 29 U.S.C. §§1002(1) and 1003(a)(3). They may bring a civil action to recover benefits allegedly due under the plan. 29 U.S.C. §1132(a)(1)(B). As the administrator of the employee benefit plan, Blue Cross is a fiduciary for ERISA purposes. 29 U.S.C. §1002(21)(B); *Chicago Board Options Exchange, Inc. v. Connecticut General Life Insurance Company*, 713 F.2d 254, 258-60 (7th Cir. 1983). Accordingly, Blue Cross' duties and responsibilities for managing and administering the plaintiffs' plan are defined as follows:

> (1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;

> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> . . . .
>
> (D) in accordance with the documents and instruments governing the plan . . . .

29 U.S.C. §1104(a)(1).

To hold Blue Cross liable for denying them benefits under the plan, the plaintiffs must establish that Blue Cross' decision or conduct was arbitrary, capricious or motivated by bad faith. *Wardle v. Central States Pension Fund*, 627 F.2d 820, 823-24 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) (pension benefits case). We may not undertake a *de novo* review as to whether we agree with Blue Cross' decision. *Id.* at 824.

> The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of [an ERISA fiduciary]. Nevertheless, the [fiduciary] must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' . . . In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . Normally, [a decision by a fiduciary] would be arbitrary and capricious if the [fiduciary] relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it] or is so implausible that it could not be ascribed to a difference in view or the product of [its] expertise.

Motor Vehicle Manufacturers Association of the United States, Inc. et al. v. State Farm Mutual Automobile Insur-

ance Co. et al., 463 U.S. 29, 43 (1983) (citations omitted) (defining the arbitrary and capricious standard for a decision by a federal agency); *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985) (adopting the *Motor Vehicle* standard for an administrator of a pension plan under ERISA). *See also Dennard v. Richards Group Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (the arbitrary and capricious standard for an administrator of a pension plan under ERISA may require an analysis of the following three factors: "(1) uniformity of construction; (2) 'fair reading' and reasonableness of that reading; and (3) unanticipated costs.").

ANALYSIS

I.

Blue Cross' Decision

The plaintiffs contend that material issues of fact exist as to whether Blue Cross' administration of the plan was fair and reasonable because of the forumla used to categorize IVF as experimental and in light of the evidence establishing that IVF was not in fact experimental in 1984. The plaintiffs submitted expert opinions from several doctors, including members of the American College of Obstetricians and Gynecologists and the American Fertility Society, in addition to three other fertility experts, who stated that by 1982, IVF procedures were no longer experimental. In addition, government approval was not required prior to performing an IVF procedure in October, 1984.

The affidavit of K. Paul Katayama, M.D., Ph.D., a member of the medical staff of Waukesha Memorial Hospital, Good Samaritan Medical Center, and other Milwaukee area hospitals, and one of the plaintiffs' experts, included the following:

> 5. The leading international professional organization in the field of reproductive endocrinology is the American Fertility Society. In March of 1982, the Board of Directors and members of the American

Fertility Society unanimously concluded that IVF must be recognized as an acceptable treatment for achieving pregnancy.

6. In April of 1984, the Committee on Gynecologic Practice for the American College of Obstetricians and Gynecologists issued a statement on IVF/ET [in vitro fertilization/embryo transfer]. It stated:

> Today in the United States, human IVF/ET is a clinically applicable procedure. It is no longer considered purely experimental.

7. In October of 1984, I did not consider IVF/ET to be an experimental procedure, nor do I consider it so at this time. In my opinion, human IVF/ET ceased being an experimental procedure by 1982. IVF was well accepted within the medical community in 1984.

8. I am aware that Blue Cross Blue Shield United of Wisconsin continued to characterize IVF as experimental until at least October, 1985. No practitioners intimately involved in the field of IVF, as far as I know, characterized IVF as experimental at the time. In my opinion Blue Cross' characterization of IVF as experimental in 1984 and 1985 was unreasonable.

Katayama Affidavit, June 16, 1987. Dr. Katayama has an extensive and impressive curriculum vitae and his qualifications as an expert in the field of IVF have not been challenged.

The affidavit of Gloria M. Halverson, M.D., a member of the medical staff at Waukesha Memorial Hospital and Elmbrook Memorial Hospital, and another plaintiffs' expert, included the following:

5. That your affiant did not consider IVF to be an experimental procedure in 1984. That in your affiant's opinion, IVF ceased being an experimental procedure in 1982. That IVF is a well accepted procedure within the medical community and was in 1984.

> 6. That your affiant is aware that Blue Cross Blue Shield United of Wisconsin continued to characterize IVF as experimental until at least October, 1985. That no practitioners intimately involved in the field of IVF, that your affiant is aware of, characterized IVF as experimental at that time and Blue Cross' characterization as experimental is unreasonable.

Halverson Affidavit, June 15, 1987. Dr. Halverson also has an extensive and impressive curriculum vitae and her qualifications as an expert in the field of IVF have not been challenged.

The plaintiffs also proffered the deposition testimony of Dr. Sander S. Shapiro, the Director of the Reproductive Endocrine Infertility Clinic in Madison.

> Q: Were you aware of any statement by the American College of Obstetricians and Gynecologists on in vitro fertilization when you began the program [at the Madison clinic] in 1982?
>
> * * * * * * *
>
> A: My recollection is that the statement expressed the observation that this was a procedure that was beyond the purely experimental, but that like so much of the rest of medicine, improvements would be made through further experimentation.
>
> * * * * * * *
>
> A: My recollection is that the College statement was one that in essence corroborated my own feelings and impressions about the procedure.
>
> * * * * * * *
>
> Q: And what were the circumstances of that meeting in 1984 [with Blue Cross/Blue Shield of Milwaukee concerning IVF charges]?
>
> A: I was asked whether I would come to the Blue Cross offices with a number of other physicians and describe in vitro fertilization procedures to the group.
>
> * * * * * * *

A: I remember that the people from the insurance organization were concerned about the eventual costs to insurance organizations of the procedure.

Q: And were there questions asked about the status of the procedure as you perceived it, what were the protocols of the procedure?

A: I don't think anybody got into exact protocols. I do recall that people asked whether this was a procedure that was beyond the realm of experimentation, and my answers were at that time very much that it was beyond the sole realm of experimentation.

* * * * * * *

Q: Now, Mrs. Reilly received her IVF treatment in October of 1984. What's your opinion of the IVF treatment at that point insofar as whether it was experimental or investigational?

A: I think that it clearly was a procedure in 1984 that could be offered as a strictly clinical therapeutic procedure.

Q: Were any aspects of that procedure in your opinion experimental or investigational at that point?

A: I think that like all of medicine, it is always investigational and experimental in the sense that we have a potential for doing better and should investigate that potential.

Dr. Sander Shapiro Deposition, May 26, 1987, at 41-47, 49, 52.

In contrast, Blue Cross did not submit any affidavit or deposition testimony from anyone with personal knowledge about IVF procedures indicating that IVF was experimental in 1984. Blue Cross proffered the deposition testimony of Edward Seitz, Blue Cross Assistant Vice President, Political Subdivision-Business for Blue Cross, that Blue Cross decided that IVF was an experimental procedure because its success rate was less than 50%. Seitz testified that Blue Cross' decision was based on in-

formation provided by the National Blue Cross and Blue Shield Association ("National Association") and its own Blue Cross and Blue Shield United Medical Review Committee ("Medical Review Committee").

Seitz spoke with Bev Krutz, an Assistant Vice-President of the Blue Cross Medical Review Board, and she told him how Blue Cross determined that IVF was experimental.

Q—And what did Bev Krutz tell you?

A—She told me in essence that the determination has been established that the success rate is less than 50 percent, and that the position of the Informational Blue Cross-Blue Shield Association, that it is still experimental and in the developmental stages, and also that's of our own Medical Review Department and, therefore, is not a covered service under the contract.

Q—Now when she told you that the success ratio of the procedure was less than 50 percent, did she give you any indication of what kind of documentation she was relying upon to make that determination?

A—She may have but I don't recall.

Q—And you've made some reference to both the National Blue Cross and Blue Shield Association and the Blue Cross and Blue Shield United Medical Review Committee?

A—Yes.

Q—Can you tell me what the National Blue Cross and Blue Shield Association is?

A—This is an association that all Blue Cross plans and all Blue Shield plans belong to. We do it on a voluntary basis, although they do have jurisdiction and say over who can use and cannot use the logos and the name of Blue Cross and Blue Shield. It's a servant of all of the plans in my view in that they are resource people. They are in the position to gather statistics, have broad knowledge in the med-

ical field and make determinations and recommendations to each of the plans, and there are 78 Blue Cross plans and almost an equal number of Blue Shield plans throughout the country.

Q—Did you ever have any personal contact with that association?

A—*Not in this regard.* It would be for marketing purposes.

* * * * * * *

Q—As a result then of your conversation with Bev Kurtz, you then wrote this letter which is Exhibit 1 page 2 to Mr. Cavallaro [an MTEA official] right?

A—Right.

Q—And in that letter you concluded that IVF is a noncovered procedure for the reasons that we've gone through?

A—This is correct.

Seitz Deposition at 8-11 (emphasis added).

After briefly summarizing the deposition testimony and affidavits submitted by the plaintiffs, the district court granted the defendant's motion for summary judgment based on the following analysis:

> The court now turns to the specific exclusion at issue. The language in the exclusion exempts experimental procedures "not yet recognized as accepted medical practice by Blue Cross & Blue Shield United . . ." At deposition, Edward Seitz, Assistant Vice President, Political Subdivision-Business for Blue Cross, testified that he contacted the medical review committee, which is maintained jointly by Blue Cross-Blue Shield plans across the country and was told that the determination had been made that the success rate of in vitro fertilization procedures was less than fifty percent, and that it was thus considered to be experimental and in the developmental stages. The medical review committee is composed of physi-

> cians who guide and provide expert opinion and "consider the recommendations of the medical review policy at the company with regard to new procedures, fees, etc." The plaintiffs argue that the court ought not consider this because rate of success is not determinative in other procedures such as those which are life threatening. The court disagrees. As I've stated previously, my review is focused solely on whether the denial of benefits was arbitrary, capricious, or motivated by bad faith. A review of the evidence submitted by the plaintiffs on this issue simply does not rise to the level where I can find that there is a genuine issue of material fact present. I have accordingly determined to grant summary judgment to the defendant.

District Court Decision And Order at 7-8.

It should be noted first that Seitz testified he relied solely on what Bev Krutz, another Blue Cross employee told him. The district court apparently simply accepted Blue Cross' conclusion based on Seitz' hearsay testimony. No expert testified that in 1984 IVF was experimental and no comparison with the plaintiffs' experts' testimony was made. In addition, the validity of Blue Cross' rationale, the success ratio, was not reviewed.

A decision may be arbitrary and capricious if Blue Cross "offered an explanation for its decision that runs directly counter to the evidence before [it] . . . ." *Motor Vehicles*, 463 U.S. at 43. The evidence proffered by the plaintiffs' experts runs counter to Blue Cross' decision and creates a material issue of fact as to whether Blue Cross' decision was arbitrary, capricious or motivated by bad faith. We do not suggest that, faced with equally conflicting evidence that IVF was or was not experimental in October, 1984, Blue Cross would necessarily face liability. However, the question of whether Blue Cross' decision was arbitrary, capricious or motivated by bad faith remains a disputed question of fact in light of the substantial contradictory evidence, as well as the reasonableness

of employing a success ratio per se, particularly the 50% ratio used. These questions were not addressed by the district court.

Based on the district court's analysis, Blue Cross could immunize itself from liability for its decisions as a plan administrator simply by creating a plan which provides that it will deny claims for medical procedures if Blue Cross' internal advisory committees deem them experimental. ERISA's provisions do not permit such potential abuses; decisions and their rationales are reviewable. In this case, the reasonableness of the decision to characterize IVF as experimental is ultimately Blue Cross' responsibility.

The fact that Blue Cross allegedly relied on the advice of its own advisory groups who presumably assist Blue Cross in the administration of its health plans nationwide, those for which it is also an insurer, creates an inherent risk of abuse. Moreover, we do not have here direct evidence that Blue Cross medical review committees found IVF experimental in 1984, only Seitz' statement that Krutz, another Blue Cross employee, had told him so. Dr. Shapiro noted that Blue Cross, understandably, was concerned with the cost of IVF. When Blue Cross sought his independent advice, however, he gave them a different conclusion than they reached.

The plaintiffs contend that a procedure's success ratio alone cannot determine whether it is experimental and material issues of fact exist as to whether the decision to classify procedures apparently based on this factor alone is arbitrary and capricious. Otherwise, they contend, Blue Cross has too much discretion and could deny coverage, for example, for treatments administered to terminally ill patients. A success ratio for such treatments might well approach 0%.

Not only may the decision to grant or deny coverage based solely on a success ratio per se be arbitrary and capricious, but the particular ratio selected, in this case, for IVF, may well be arbitrary and capricious. No evi-

dence was presented to the district court on either of these questions.

Dr. Shapiro's testimony concerning whether IVF was deemed experimental in 1984 may have been misinterpreted by the district court. He stated that "I think that like all of medicine, it is always investigational and experimental in the sense that we have a potential for doing better and should investigate that potential." Dr. Sander Shapiro Deposition at 52. The context of the district court's opinion in which this statement by Dr. Shapiro is cited suggests that the district court interpreted his testimony as support for Blue Cross' decision that IVF was experimental. District Court Decision And Order at 6-7. This interpretation leads to the conclusion that Dr. Shapiro's testimony was that *all* medical procedures are experimental. This strains Dr. Shapiro's testimony beyond logic, particularly when he stated that he had advised Blue Cross in 1984 that IVF was very much "beyond the sole realm of experimentation."

At oral argument the defendant's attorney suggested that the specific formula used by Blue Cross in the context of IVF procedures may differ from that employed for treatment for terminally ill cancer patients. The plaintiffs' complaint alleges that Blue Cross does not use a success ratio for "treatment of other diseases (heart, cancer, etc.)." Plaintiffs' Complaint at para. 7(c). The defendant's answer, however, denied these allegations and stated simply "that payments were made in accordance with the benefits provided under the employee benefit plan." Defendant's Answer at para. 7. This is obviously a disputed issue of material fact. In addition, as noted, several other material issues of fact exist as to whether the use of a success ratio in and of itself is arbitrary and capricious.

Blue Cross also suggests that because the plan at issue is self-insured, it has no risk and thus no incentive to deny claims which could lead to arbitrary and capricious decisions. That is not necessarily true. In the long run, if Blue Cross were to grant too many claims, as perceived by MPS, it might be replaced as the plan's administrator. Moreover, the ultimate issue in the case is whether Blue

Cross acted arbitrarily and capriciously, not whether it had an incentive to do so.

In addition to the unresolved issues we have already noted, several other questions which remain include the following: (1) Who made the ultimate decision by Blue Cross that IVF is experimental? (2) What are their qualifications and on what basis was that decision made? (3) How many IVF procedures were analyzed to make this conclusion? (4) What other evidence was reviewed by the decisionmakers which suggested that it was not experimental? (5) How are the decisionmakers compensated by Blue Cross? (6) How did this decision affect other Blue Cross health plans?

Notwithstanding the deferential standard given to the administrator of an ERISA health benefit plan, there are clearly disputed material issues of fact as to the basis of the defendant's decision and whether it was arbitrary, capricious or motivated by bad faith. Accordingly, the district court's order granting the defendant's motion for summary judgment with respect to the plaintiffs' ERISA claim is reversed.

II.

Are the Plaintiffs' State Law Claim of Bad Faith And Demand For Punitive Damages Preempted by ERISA?

In its order the district court concluded that the plaintiffs' state law claims were preempted by ERISA or, alternatively, were without an independent basis for jurisdiction and he declined to take pendent jurisdiction.

> I have reviewed the proposed amended complaint which the plaintiffs would have this court accept. Having determined that the plaintiffs' state law claims are preempted by ERISA, I have determined that to permit the plaintiffs leave to amend would be futile. Those portions of the claim which are preempted would be subject to summary disposition under the above rationale. Those state claims which re-

> main would be pendent and, there being no diversity between the parties, would be declined by the court as pendent.

District Court Decision And Order at 8. The district court's opinion provides no analysis and cites no ERISA provisions on the preemption issue.

With respect to the state law claims in their original complaint, the plaintiffs challenge the district court's preemption conclusion only as to their claim for bad faith and demand for punitive damages and they argue that pendent jurisdiction is appropriate. We therefore affirm the district court's dismissal of the plaintiffs' claims of intentional infliction of emotional distress and loss of consortium, on the theory that these claims are preempted under 29 U.S.C. §1144(a). *See Metropolitan Life Insurance Company v. Taylor*, 107 S.Ct. 1542, 1546 (1987). Whether or not the plaintiffs' claims of fraud, breach of fiduciary duty and conspiracy, claims with which they sought to amend their complaint, are preempted will be addressed in section *III*, *infra*.

ERISA is a comprehensive scheme regulating health and benefit plans. ERISA's "preemption clause" provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws in so far as they may now or hereafter relate to any employee benefit plan . . . .

29 U.S.C. §1144(a). ERISA's "savings clause" provides as follows:

> Except as provided in subparagarph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities.

29 U.S.C. §1144(b)(2)(A). The savings clause is modified by the so-called "deemer clause":

> Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under

> section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, . . . or to be engaged in the business of insurance . . . for the purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

29 U.S.C. §1144(b)(2)(B).

If a plan purchases insurance, as opposed to being self-insured, it is "directly affected by state laws that regulate the insurance industry." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 732 (1985). In *Metropolitan Life Insurance Co. v. Massachusetts*, the Court was faced with a Massachusetts statute requiring that all insurance contracts affecting Massachusetts citizens or written in Massachusetts provide minimum mental health coverage. *Id.* at 727. The statute applied to both insured (thos that purchase insurance) and noninsured (self-insured) plans. *Id.* at n. 14. The state argued that its law, as applied to insured plans, was not preempted by ERISA. The Court noted that Massachusetts was in effect acknowledging that its statute as applied to self-insured plans would not be saved from preemption because of the "deemer clause." *Id.*

We need not decide whether Wisconsin law concerning punitive damages and bad faith "regulates insurance." In this case, the plan administered by Blue Cross is self-insured. It is entirely funded by the MPS and MTEA. Neither entity is an insurer and, accordingly, the deemer clause applies. The benefit plan, therefore, cannot avoid preemption. In addition, although Blue Cross is a national insurance company, in this context it is acting simply as an administrator of a self-insured plan.

> We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By doing so we merely give life to a distinc-

> tion created by Congress in the 'deemer clause,' a distinction Congress is aware of and one it has chosen not to alter.

Id. at 2393 (footnote omitted). Accordingly, the district court's order dismissing the plaintiffs' state law claims and demand for punitive damages in their original complaint is affirmed because they are preempted by the remedial provisions of ERISA. We need not review the district court's alternative holding that taking pendent jurisdiction is inappropriate.

III.

Plaintiffs' Motion For Leave To Amend Their Complaint

The plaintiffs engaged in further discovery following the filing of Blue Cross' motion for summary judgment and moved to amend their complaint to include newly discovered information. The plaintiffs contend that they discovered that Blue Cross had unilaterally and without notice retroactively modified the group master contract and that the specific exclusions in the 1984-85 contract relied upon to deny coverage were not in effect at the time of Mrs. Reilly's IVF. Plaintiffs' Amended Complaint para. 10-11. Specifically, the plaintiffs contend that any exclusions relied upon by Blue Cross were not validly inserted into the contract and that any claim of Blue Cross' egregious conduct is not preempted by ERISA. The amended complaint adds claims of conspiracy, fraud and breach of fiduciary duty. Plaintiffs' Amended Complaint para. 26-30.

Judge Curran's opinion addressed this issue in one paragraph as noted above. District Court Decision And Order at 8. It is unclear whether by referring to "the above rationale" Judge Curran meant that the plaintiffs' new allegations are preempted by ERISA, do not constitute arbitrary or capricious action or, since he applied the 1983-84 contract, they are irrelevant.

In any event, these alleged new facts are simply further *evidence* relevant to whether or not Blue Cross' ac-

tion was arbitrary, capricious or in bad faith in violation of ERISA. They do not allege a new or separate federal cause of action. The plaintiffs' complaint need not be amended to make this evidence admissible at trial. So far as state claims for breach of fiduciary duty, conspiracy, fraud or bad faith are concerned, they are, as Judge Curran found, all preempted by ERISA. *See Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985); *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987). Accordingly, the motion to amend the complaint was properly denied since it added no additional federal claims but merely pleaded additional evidence relevant to the already pending ERISA claim.

CONCLUSION

Because we find that there are numerous disputed material issues of fact regarding whether Blue Cross' decision to deny the plaintiffs' coverage for IVF was arbitrary, capricious or motivated by bad faith, we reverse the district court's order granting Blue Cross' motion for summary judgment with respect to the plaintiffs' ERISA claim. The plaintiffs do not appeal the district court's dismissal of their state law claims for intentional infliction of emotional distress and loss of consortium and we therefore affirm the district court's order on the ground that these claims are preempted. We find that the plaintiffs' state law claim of bad faith and demand for punitive damages are also preempted under ERISA and we affirm the district court's dismissal of these claims on this ground alone. Finally, because the proposed amended complaint alleges no new federal claim but merely asserts additional evidence relevant to the pending ERISA claim, and any state claims in the proposed amended complaint of breach of fiduciary duty, conspiracy, fraud or bad faith are preempted by ERISA, the denial of their motion for leave to file an amended complaint is also affirmed.

REVERSED IN PART,
AFFIRMED IN PART,
AND REMANDED.

POSNER, *Circuit Judge*, concurring and dissenting. I would affirm the district judge's decision in its entirety. There is no basis for supposing that Blue Cross of Wisconsin (as I shall call the defendant) acted arbitrarily or capriciously in denying Mrs. Reilly's claim. She underwent in vitro fertilization in 1984, at a cost of something under $3,000. The employee benefits plan under which she seeks to recoup this expense excludes "services and procedures which are experimental/investigative in nature," defined as any treatment "not yet recognized as accepted medical practice by" Blue Cross of Wisconsin. In deciding that in vitro fertilization was still an experimental procedure in 1984, and in denying her claim on that ground, the defendant consulted both its own medical advisory committee and a national association of Blue Cross-Blue Shield plans that evaluates and makes recommendations concerning medical procedures. Both groups advised it that in vitro fertilization, in part because of its success rate (below 50 percent, and perhaps as low at 10 percent), was still experimental.

The denial of benefits may be right or wrong but it is a reasonable interpretation of the plan, and that should be the end of the case. Judge Will, skilled lawyer that he is, is able to find a number of holes in the defendant's case—hearsay, lack of expert evidence to counter Mrs. Reilly's experts (with their impressive credentials), and the implausibility of classifying a procedure as experimental merely because it has a low success rate (implying, if pushed to a logical extreme, that all treatments for the terminally ill are experimental). And he is able to conjure up a host of unanswered questions concerning the qualifications of the members of the advisory committees, the committees' evidentiary basis, the method of compensating their members, and the impact of the decision on other Blue Cross-Blue Shield plans. Judge Will even questions the validity, as well as the defendant's interpretation, of the "experimental/investigative" provision—although Mrs. Reilly does not—on the ground that it gives too much discretion to the defendant.

All this probing and questioning would be fine if this were a suit for breach of a contract of insurance rather than an action for judicial review of the denial of a claim for employee benefits, if the burden of proof in a breach of contract suit were on the defendant rather than the plaintiff, and if the plaintiff in such a suit were arguing unconscionability. None of these things is true. Not only has Judge Will disregarded our role in this proceeding, the nature of the proceeding, the standard of review, and the burden of proof, but he has gone beyond the issues framed by the parties, since as I have said Mrs. Reilly does not question the validity of the "experimental/investigative" provision, but only its application to her claim.

The administrators of Blue Cross of Wisconsin are in no position to make a personal judgment on whether in vitro fertilization is an experimental procedure. They must consult experts. They consulted two expert bodies: their own medical advisory committee, and a national association of Blue Cross-Blue Shield groups that serves as a clearinghouse for medical information. On the face of things this seems a reasonable way to have proceeded. If Mrs. Reilly thought that these expert bodies were prejudiced or incompetent, she could have deposed their members; it was her responsibility, if she wanted to defeat the defendant's motion for summary judgment, to answer the unanswered questions noted by Judge Will. Instead of questioning the qualifications of the members of the advisory bodies on which the defendant relied, she presented affidavits by physicians who believe that in vitro fertilization had by 1984 moved beyond the experimental stage. As it happens these physicians are specialists in the treatment of fertility and naturally want to encourage the use of an exciting and promising treatment. All that their affidavits show, however, is that there is a difference of opinion in the medical community on the experimental character of the treatment. The existence of such a disagreement does not begin to demonstrate that Blue Cross of Wisconsin acted arbitrarily or capriciously in relying on its medical advisors.

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 5, 1988

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. HUBERT L. WILL, Senior District Judge*

KATHRYN REILLY and JOSEPH REILLY,

Plaintiffs-Appellants,

No. 87-2281 vs.

BLUE CROSS AND BLUE SHIELD UNITED OF WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 86 C 622—**Thomas J. Curran**, *Judge*.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED IN PART, AFFIRMED IN PART, AND REMANDED, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

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* Hon. Hubert L. Will, Senior District Judge for the Northern District of Illinois, Eastern Division, is sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KATHRYN REILLY and JOSEPH REILLY,

Plaintiffs,

No. 86-C-622 v.

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

Defendant.

DECISION AND ORDER

The plaintiffs commenced the above-captioned action in the Waukesha County Circuit Court on May 16, 1986, against Blue Cross & Blue Shield United of Wisconsin (Blue Cross) stating five claims for relief: breach of contract, bad faith, intentional infliction of emotional distress, loss of consortium, and punitive damages. The action was removed by Blue Cross on the grounds that, although the complaint was couched in state law terms, it actually presented a federal question governed by the terms of ERISA, 29 U.S.C. § 1132(e)(1). *See Metropolitan Life Insurance Company v. Taylor*, ___ U.S. ___, 107 S. Ct. 1542 (1987). Before the court are the defendant's motion for summary judgment and the plaintiffs' motion for leave to amend their complaint.

The following facts the court finds uncontroverted and dispositive. Joseph Reilly is an employee of the Milwaukee Public Schools (MPS) which is bound by a collective bargaining agreement with the Milwaukee Teachers'-Education Association. Through the agreement Reilly and his wife Kathryn are covered under the Group Employee Health Plan funded by MPS and administered by Blue Cross. The relationship between MPS and Blue Cross is governed by an agreement defining the role of Blue Cross as plan administrator in the processing and payment of

claims. The Group Employee Health Plan is governed by the Employee Retirement Income Security Act of 1974 (ERISA) which at 29 U.S.C. § 1002(1) defines Employee Welfare Benefit Plan in relevant part as "any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . ." The MPS Plan is self-insured in that MPS bears the risk and responsibility for the payment of benefits to the employees. Blue Cross, in its capacity as plan administrator, makes the determinations as to whether to grant or deny claims, is not at risk for any health care costs and receives an administrative fee based on the dollar volume of claims honored.

In 1982, Kathryn Reilly was diagnosed as having endometriosis, a condition which caused problems with her ability to conceive. She was treated for her condition and also underwent a eight month period of artificial insemination which was unsuccessful. During the summer of 1984, Kathryn was again treated for endometriosis and during the course of the surgery she was treated in preparation for in vitro fertilization. During this period of time Kathryn contacted Blue Cross to inquire as to whether the in vitro fertilization procedure would be covered under the plan. She does not recall to whom she spoke but she was told that the procedure was not covered because it was considered by Blue Cross to be experimental. During this period of time, the Master Plan contained an amendment which added to the list of exclusions the following paragraph:

> Services and procedures which are experimental/investigative in nature. Experimental/investigative means the use of any treatment, procedure, facility, equipment, drugs, devices or supplies not yet recognized

> as accepted medical practice by Blue Cross & Blue Shield United and any of such items requiring federal or other governmental agency approval and for which approval has not been granted at the time services were rendered.[1]

Nevertheless, Kathryn Reilly elected to proceed with in vitro fertilization, was apparently successful on the first attempt, and her baby, Nora, was born the following spring. Although Blue Cross paid for the expenses involved with the delivery, including intensive care for baby Nora, it continues to refuse to pay for the in vitro fertilization treatment.

In seeking summary judgment it is traditionally the burden of the moving party to satisfy the court that no genuine issue of material fact exists which would preclude granting judgment as a matter of law. *Cedillo v. International Association of Bridge, etc.*, 603 F.2d 7, 9-10 (7th Cir. 1979). All inferences drawn from the record before the court must be resolved in favor of the nonmoving party. *Adickes v. S.H. Kress & Co.*, 498 U.S. 144, 159-61. Presuming there has been an adequate time for discovery the nonmoving party bears the burden of coming forward with a showing sufficient to establish that at least a genuine issue of material fact exists with respect to each essential element which the nonmoving party would be required to prove at trial. *Celotex Corp. v. Cattrett*, ____ U.S. ____, 106 S. Ct. 2548 (1986). The evidence produced

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[1] There is considerable confusion in the record concerning the 1984-85 contract between Blue Cross and MPS bearing an effective date of July 1, 1984, but dated 10/84. This agreement lists in vitro fertilization as one of the procedures which is considered to be experimental. In addition it lists in vitro fertilization independently as an excluded procedure. The plaintiffs suggest that a genuine issue of material fact exists as to whether this document (the 1984-85 agreement) was in effect at the time the plaintiff underwent the surgery. For purposes of this decision the court will presume that the parties were bound by the prior agreement which did not specifically mention in vitro fertilization as an exclusion either on its own or as being experimental/investigative.

by the nonmoving party need not be in a form that would necessarily be admissible at trial but must, at the very least, be sufficient to show that a triable issue exists. *Id.* at 2553. In reviewing the evidentiary materials, the district court is not required to evaluate every conceivable inference but only reasonable ones. *Parker v. Federal National Mortgage Association*, 741 F.2d 975, 980 (7th Cir. 1984). The standards for ruling on a summary judgment motion are identical to those which govern a trial judge in the determination as to whether to direct a verdict. *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2511 (1986) and thus the purpose of summary judgment is to avoid unnecessary trials where it is clear from the record that no triable issue exists. *Moore v. Market Place Restaurant, Inc.*, 654 F.2d 1336, 1339 (7th Cir. 1985).

With all this in mind the court now turns to the question of whether summary judgment should be granted. In establishing a violation of ERISA, the burden is on the plaintiffs to establish that the administrator's denial of benefits was arbitrary, capricious or motivated by bad faith. *Wardle v. Central States Pension Fund*, 627 F.2d 820, 823-24 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Taylor v. Suburban Teamsters of Northern Illinois Fringe Benefit Funds*, 613 F. Supp. 205, 209 (N.D. Ill. 1985). In support of its contention that Blue Cross was acting in an arbitrary and capricious manner or was motivated by bad faith, the plaintiffs have submitted the deposition of Dr. Sander S. Shapiro. It was Dr. Shapiro's opinion that in 1984 in vitro fertilization was a standard clinical procedure which was not solely in the realm of the experimental. Dr. Shapiro is the Director of the Reproductive Endocrine Infertility Clinic in Madison. The Doctor recounted how his program began in June of 1982, with the first procedures begun in October or November of that year. At that period of time, as today, there is a wide range of methodologies used throughout the country for accomplishing in vitro fertilization. The doctor defined "success rate" as "the number of pregnancies identi-

fiable by other than chemical means as the numerator, and the denominator, the number of attempts to recover eggs, in other words, the number of laparoscopies." He then identified the success rate at the time the clinic was established as being at least 10 percent. He further stated that of the 130 laparoscopic retrieval of eggs which the clinic has performed there have been approximately eighteen live births. When pressed as to whether there were aspects of the procedure in 1984 which could be considered experimental or investigational, the doctor replied "I think that like all medicine, it is always investigational and experimental in the sense that we have a potential for doing better and should investigate that potential."

The plaintiffs have also submitted the affidavits of Doctor Gloria M. Halverson and Doctor K. Paul Katayama. Both doctors expressed the opinion that the procedure was not experimental in 1984.

The court now turns to the specific exclusion at issue. The language in the exclusion exempts experimental procedures "not yet recognized as accepted medical practice by Blue Cross & Blue Shield United . . ." At deposition, Edward Seitz, Assistant Vice President, Political Subdivision-Business for Blue Cross, testified that he contacted the medical review committee, which is maintained jointly by Blue Cross-Blue Shield plans across the country and was told that the determination had been made that the success rate of in vitro fertilization procedures was less than fifty percent and that it was thus considered to be experimental and in the developmental stages. The medical review committee is composed of physicians who guide and provide expert opinion and "consider the recommendations of the medical review policy group at the company with regard to new procedures, fees, etc." The plaintiffs argue that the court ought not consider this because rate of success is not determinative in other procedures such as those which are life threatening. The court disagrees. As I've stated previously, my review is focused solely on whether the denial of benefits was arbitrary, capricious, or motivated by bad faith. A review of the evi-

dence submitted by the plaintiffs on this issue simply does not rise to the level where I can find that there is a genuine issue of material fact present. I have accordingly determined to grant summary judgment to the defendant.

I have reviewed the proposed amended complaint which the plaintiffs would have this court accept. Having determined that the plaintiffs' state law claims are preempted by ERISA, I have determined that to permit the plaintiffs leave to amend would be futile. These portions of the claim which are preempted would be subject to summary disposition under the above rationale. Those state claims which remain would be pendent and, there being no diversity between the parties, would be declined by the court as pendent. Accordingly,

IT IS ORDERED that the defendant's motion for summary judgment be and hereby IS GRANTED.

IT IS FURTHER ORDERED that the plaintiffs' motion for leave to amend their complaint be and hereby is DENIED.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 20th day of July, 1987.

/s/ THOMAS J. CURRAN
United States District Judge

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 86-C-622 – Hon. Thomas J. Curran

KATHRYN REILLY, et al.

v.

BLUE CROSS & BLUE SHIELD

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came on hearing before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

It is ordered that the defendant's motion for summary judgment be and hereby is Granted.

It is further ordered that the plaintiffs' motion for leave to amend their complaint be and hereby is Denied.

Clerk
/s/ SOFRON B. NEDILSKY

Date 7/20/87

(By) Deputy Clerk
/s/ D. MCLEAD

(2)

No. 88-223

In The

Supreme Court of the United States

October Term, 1988

KATHRYN REILLY and JOSEPH REILLY,
Petitioners,

v.

BLUE CROSS AND BLUE SHIELD UNITED OF WISCONSIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTIONS PRESENTED

1. Whether, Under ERISA, An Employee Benefit Plan Administrator May Be Held Liable To An Individual Plan Participant For Punitive Damages For Improper Processing Of A Benefit Claim. [The question has been restated to relate specifically to the present case by specifying that recovery is sought by an individual rather than by the plan as a whole.]

2. Whether ERISA Preempts State Law Bad Faith Claims Against Administrators of Self-Insured Employee Benefit Plans. [The second question has been restated to reflect the self-insured nature of the instant employee benefit plan.]

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Kathryn and Joseph Reilly, and the Respondent, Blue Cross and Blue Shield United of Wisconsin.

In compliance with Supreme Court Rule 28.1, Blue Cross and Blue Shield United of Wisconsin provide the following list of affiliated corporations:

BLUE CROSS AND BLUE SHIELD UNITED OF WISCONSIN

Subsidiaries and Affiliates

Comp Care Health Services Insurance Corp. (wholly owned)

Pro-Health, Inc. (wholly owned)

Take Control, Inc. (owned 60% by Blue Cross and Blue Shield United of Wisconsin, and 40% by Pro Health, Inc.)

United Wisconsin Services, Inc. (wholly owned)

a) United Wisconsin Insurance Company (which is itself the 100% owner of Leasing Unlimited, Inc.)

b) United Wisconsin Life Insurance Company

c) United Wisconsin Proservices, Inc.

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STATEMENT OF THE CASE

The Respondent does not take issue with the Petitioners' Statement of the Case except in two respects.

In the first instance, Petitioners refer to the denial of the "insurance claim" for Mrs. Reilly's benefit. Petition, p.3. In the second instance, Petitioners note that their original complaint claimed that "... Blue Cross breached the insurance contract. ..." Petition, p.3.

It is inaccurate in both instances to suggest that the benefit plan involved is an "insured" plan. The District Court recognized the non-insured nature of the plan, stating:

> "The MPS Plan is self-insured in that MPS bears the risk and responsibility for the payment of benefits to the employees. Blue Cross, in its capacity as plan administrator, makes the determinations as to whether to grant or deny claims, is not at risk for any health care costs and receives an administrative fee based on the dollar volume of claims honored." Petitioners' Appendix, p. 27.

The Court of Appeals also noted that Respondent (Blue Cross) served as the plan administrator and *not* as an insurer:

> "In this case, the plan administered by Blue Cross is self-insured. It is entirely funded by the MPS and MTEA. Neither entity is an insurer and, accordingly, the deemer clause applies." Petitioners' Appendix, p.19.

Respondent believes the distinction between insured and uninsured plans is an important one for purposes of determining whether certain state law claims, such as the bad faith claim asserted by Petitioners in the present action, survive preemption under ERISA.

Respondent further accepts Petitioners' Appendix and will make reference thereto in the same manner employed by Petitioners.

ARGUMENT

I. ERISA Does Not Authorize The Recovery Of Punitive Or Extra-Contractual Damages

Petitioner suggests that there is a conflict between Circuits as to whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. sec. 1001, *et. seq.*, permits the recovery of punitive or extra-contractual damages. A review of Petitioners' authorities demonstrates conclusively the absence of any such conflict.

Petitioner cites *Kuntz v. Reese*, 760 F. 2d 926, 938 (9th Cir. 1985), *cert. denied* 107 S.Ct. 318 (1986), as authority for the availability of ERISA punitive damages in the Ninth Circuit. While the *Kuntz* court did permit the recovery of punitive damages, that decision was issued in May of 1985, prior to the June, 1985 decision of this Court in *Massachusetts Mutual Life Insurance Company v. Russell*, 105 S.Ct. 3085 (1985) (hereinafter "*Russell*"). In a subsequent decision, the Ninth Circuit, in *Sokol v. Bernstein, M.D.*, 803 F. 2d 532 (9th Cir. 1986), adopted the rationale of *Russell, supra*, to deny punitive damages under ERISA sec. 409(a), 29 U.S.C. sec. 1109(a). The *Sokol* court then went on to consider the potential availability of punitive damages under ERISA sec. 502(a)(3), 29 U.S.C. sec. 1132(a)(3), stating:

> "From the preceding analysis of *Russell*, we think it clear that the Court's reasons for disallowing extra-contractual damages extend to §502(a)(3), *footnote 5* notwithstanding. However, even assuming *arguendo* that *Russell's* rationale does not extend to §502(a)(3), a conscientious examination of the statute's legislative history compels the conclusion that extra-contractual damages are unavailable." (p.537).

The only other decision cited by Petitioners to demonstrate a conflict between Circuits is *Monson v. Century Manufacturing Co.*, 739 F. 2d 1293 (8th Cir. 1984). Petitioners are flatly wrong in suggesting that *Monson* permits

recovery of ERISA punitive damages in the Eighth Circuit. Petitioners' precise contention was addressed by another District Court within the Eighth Circuit in *Hollenbeck v. Falstaff Brewing Corporation*, 605 F. Supp 421 (E.D. Mo., 1984). In rejecting the contention that *Monson* permitted recovery of punitive damages, the *Hollenbeck* court stated:

> "It is highly doubtful that the Eighth Circuit Court of Appeals would affirm an award of punitive damages in an ERISA case. *See Dependahl v. Falstaff Brewing Corp.*, 653 F. 2d 1208, 1217 (8th Cir. 1981). Plaintiff, however, has cited *Monson v. Century Manufacturing Co.*, 739 F.2d 1293 (8th Cir. 1984), for the proposition that punitive damages are now recoverable in an ERISA case within the Eighth Circuit. *But Monson does not hold, state, infer, or support the proposition that punitive damages are recoverable on an ERISA cause of action.* . . . The district court awarded, and the Court of Appeals affirmed, punitive damages *only as to the non-ERISA profit sharing program* under the Minnesota common law of fraudulent misrepresentation. . . . No punitive damages were awarded for any cause of action relating to the ERISA pension plan. *See Monson v. Century Manufacturing Co.*, No. 4-80-Civil-614, mem.op. (D.Minn. May 17, 1983)." (p.435, 436) (Emphasis added)

Respondent's research has disclosed no Court of Appeals Decisions subsequent to *Russell* in which punitive or extra-contractual damages have been permitted under ERISA. In fact, it appears that, in addition to the decision of the Ninth Circuit in *Sokol, supra*, each of the other Courts of Appeals to have considered this issue has also specifically concluded that ERISA sec. 502(a)(3), 29 U.S.C. sec. 1132(a)(3), does *not* permit the award of such damages. *See, Varhola v. Doe*, 820 F. 2d 809, 817 (6th Cir. 1987); *Sommers Drug Stores Co. Employees Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F. 2d 1456, 1464-1465 (5th Cir. 1986) *cert. denied*, 107 S.Ct. 884, 107

S.Ct. 1298 (1987); *Bishop v. Osborn Transportation, Inc.*, 838 F. 2d 1173, 1174 (11th Cir. 1988); *Powell v. Chesapeake and Potomac Telephone Company of Virginia*, 780 F. 2d 419, 424 (4th Cir. 1985), *cert. denied* 476 U.S. 1170 (1986) *Dependahl v. Falstaff Brewing Corp.*, 653 F. 2d 1208, 1216 (8th Cir.) (dictum), *cert. denied* 454 U.S. 968, 454 U.S. 1084 (1981).

Far from demonstrating any conflict, the afore-cited decisions clearly support the present decision of the Seventh Circuit denying the recovery of punitive and extra-contractual damages under ERISA.

II. Petitioners' State Law Claim of Bad Faith Is Preempted By ERISA.

As noted in Respondent's comments relative to the Statement of the Case, both the District Court (Petitioner's Appendix, p. 27) and the Court of Appeals (Petitioners' Appendix, p.19) recognized the self-insured nature of the present plan.

Notwithstanding this recognition, Petitioners seek to rely on the insurance regulation "savings clause" of ERISA sec. 514(b)(2)(A), 29 U.S.C. sec. 1144(b)(2)(A) to protect their claim for state-law based "bad faith" damages. Petitioners fail to recognize that, absent some element of insurance, there is simply nothing on which the "savings clause" might operate.

Petitioners argue that to distinguish between the regulation of insured and uninsured plans would be contrary to the intent and purpose of ERISA (Petitioners' Petition, p.10). That argument, however, ignores that this distinction is mandated by the statute as a result of Congress' effort to preserve to the States their traditional right to regulate insurance, notwithstanding Congress' desire to provide otherwise comprehensive regulation over employee benefits. This distinction was specifically noted and acknowledged by this Court in *Metropolitan Life Insurance Company v. Massachusetts*, 105 S.Ct.

2380 (1985), where the Court stated:

> "We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing, we merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one itA has chosen not to alter." (p. 2393)

Petitioners reliance on *Simmons v. Prudential Insurance Company of America*, 641 F. Supp. 675 (D.Colo. 1986) and *Presti v. Connecticut General Life Insurance Company, Inc.*, 6A05 F. Supp. 163 (N.D.Cal. 1985) is misplaced, since in each case the plans in question involved some element of insurance to which the ERISA "savings clause" could attach. The decision in *Lueck v. Aetna Life Insurance Company*, 116 Wis.2d 559, 345 N.W.2d 699 (1984) suggests that the plan involved there may have been uninsured, although the decision contains no reference to or discussion of the effect of ERISA on either the plan or claim under consideration. Respondent respectfully submits that, to the extent *Lueck* failed to consider ERISA and to the extent its holding is contrary to *Metropolitan*, *supra*, it is wrongly decided.

Respondent further submits that *Metropolitan* is dispositive of the present issue and that under its holding, Petitioners' state-law claim for "bad faith" damages is clearly preempted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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